101

(3)

No. 07-1547

FILED
AUG 27 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

ELIZABETH AGUILERA, ET AL.,
Petitioners,

v.

LEROY BACA, INDIVIDUALLY AND AS SHERIFF OF THE COUNTY OF LOS ANGELES, ET AL.,
Respondents.

On Petition for a Writ Of Certiorari To The United States Court of Appeals For The Ninth Circuit

BRIEF FOR THE NATIONAL ASSOCIATION OF POLICE ORGANIZATIONS, INC., ET AL., AS AMICI CURIAE IN SUPPORT OF PETITIONERS

MICHAEL R. BROMWICH
Counsel of Record
TOMMY P. BEAUDREAU
KAREN S. BLOOM
FRIED, FRANK, HARRIS,
SHRIVER & JACOBSON LLP
1001 Pennsylvania Ave., NW
Washington, D.C. 20004-2505
(202) 639-7000

Counsel for Amici Curiae

AUGUST 27, 2008

QUESTION PRESENTED

Does a public employer violate its employees' Fifth Amendment rights by punishing them for their refusal to provide potentially incriminating testimony in an internal investigation when it did not provide notice that the testimony could not be used against them in criminal proceedings and that they would therefore be subject to administrative discipline if they did not testify?

TABLE OF CONTENTS

PAGE

QUESTION PRESENTED i

TABLE OF AUTHORITIES v

INTEREST OF THE AMICI CURIAE 1

INTRODUCTION 3

REASONS FOR GRANTING THE PETITION 4

I. THE WIDESPREAD UNCERTAINTY ABOUT THE FIFTH AMENDMENT'S "*GARRITY* NOTICE" REQUIREMENT IMPAIRS THE EFFECTIVENESS AND FAIRNESS OF INVESTIGATIONS PERFORMED BY PUBLIC AGENCIES 4

A. Internal Investigations Of Alleged Misconduct By Public Employees Are Central To The Public's Confidence In Government Institutions, Including Especially Law Enforcement Agencies 4

B. Law Enforcement Agencies' Internal Investigations Of Misconduct Allegations Against Law Enforcement Officers Must Respect Their Fifth Amendment Rights 7

1. Police Officers Are Frequently Subject To Internal Investigations Of Alleged Misconduct 7

2. Notice Of *Garrity* Rights Is The Only Constitutionally Permissible Rule 9

PAGE

3. Clear Notice Of *Garrity* Rights Promotes The Interests Of Law Enforcement Agencies, Individual Officers, And The General Public 10

C. The Conflict Among The Courts Of Appeals Regarding *Garrity* Notice Under The Fifth Amendment Has Generated Widespread Confusion And Uncertainty 14

1. The Ambiguity Resulting From The Circuit Split Has Created At Least Three Conflicting Legal Scenarios Under *Garrity* 14

2. The Confusion Over Application Of The *Garrity* Notice Requirement Is Reflected In The Ambiguous Guidance Provided To Investigators And Officers 15

II. Use Of *Garrity* Notices Is Widely Regarded As A Best Practice In Law Enforcement And Is A Practical And Effective Method For Protecting Officers' Fifth Amendment Rights ... 16

A. *Garrity* Notice Is A Best Practice In Law Enforcement 16

B. Law Enforcement Agencies Across The Nation Use *Garrity* Notices As A Practical And Effective Method For Protecting The Integrity Of Internal Investigations And Officers' Rights 19

1. Federal Agencies 20

2. State And Local Agencies 22

PAGE

C. *Garrity* Notice Procedures Are Easy To Implement And Are Effective 23

III. This Is An Ideal Case For Review Because It Implicates Many Of The Significant Issues Presented By The Absence Of A "Bright Line" *Garrity* Rule 24

CONCLUSION 26

TABLE OF AUTHORITIES

PAGE

CASES

Aguilera v. Baca,
510 F.3d 1161 (9th Cir. 2007) 10, 12, 15

Confederation of Police v. Conlisk,
489 F.2d 891 (7th Cir. 1973) 14

Gardner v. Broderick,
392 U.S. 273 (1968) 12

Garrity v. State of New Jersey,
385 U.S. 493 (1967) ..... *passim*

Gulden v. McCorkle,
680 F.2d 1070 (5th Cir. 1982) 15

Hill v. Johnson,
160 F.3d 469 (8th Cir. 1998) 15

Lybarger v. City of Los Angeles,
40 Cal.3d 822, 710 P.2d 329 (1985) 12

Modrowski v. Dep't of Veterans Affairs,
252 F.3d 1344 (Fed. Cir. 2001) 14

Sher v. U.S. Dep't of Veterans Affairs,
488 F.3d 489 (1st Cir. 2007) 15

Uniformed Sanitation Men Ass'n v. Comm'r of Sanitation,
426 F.2d 619 (2d Cir. 1970) 10, 14

United States v. Friedrick,
842 F.2d 382 (D.C. Cir. 1988) 21-22

STATUTES

Inspector General Act of 1978 (as amended),
5 U.S.C. app. 3 5

PAGE

MISCELLANEOUS

Beau Thurnauer, *Best Practices Guide for Internal Affairs: A Strategy for Smaller Departments* (International Association of Chiefs of Police, undated), *available at* http:www.theiacp.org/documents/pdfs/Publications/BP-InternalAffairs.pdf..... 7, 16

Byron L. Warnken, *The Law Enforcement Officers' Privilege Against Compelled Self-Incrimination*, 16 U. BALT. L. REV. 452 (1987).... 9

California Office of the Inspector General, http://www.oig.ca.gov 5

City of Chicago Office of the Inspector General, http://chicagoinspectorgeneral.org/office-history.html 6

Consent Decree, *United States v. City of Steubenville*, Civil No. C2 97-966 (S.D. Ohio Sept. 3, 1997), *available at* http://www.usdoj.gov/crt/split/documents/steubensa.htm 18, 19

Consent Judgment, *United States v. City of Detroit*, No. 03-72258 (E.D. Mich. June 12, 2003), *available at* http://www.usdoj.gov/crt/split/documents/dpd/detroitpd_uofwdcd_613.pdf..... 17

Delaware State Police Office of Professional Responsibility, http://dsp.delaware.gov/oopr.shtml 6

Fed. Commc'ns Comm'n, *Employee Rights and Warnings*, *available at* http://www.fcc.gov/oig/oigrights.html 22

PAGE

Georgia Office of the Inspector General, http://oig.Georgia.gov 5

J. Michael Hannon, *Security Clearances: Know Your Rights*, FOREIGN SERV. J. (Sept. 2005) 16, 22

Janet Reno, U.S. Attorney Gen., Address at National Press Club Luncheon (Apr. 15, 1999), *available at* http://www.usdoj.gov/archive/ag/speeches/1999/npc.htm 6-7

Law Enforcement Officers Procedural Bill of Rights, H.R. 3440, 110th Cong. (2007) 8

Letter from Alice S. Fisher, Assistant Attorney Gen., to Vice Chairs of the President's Council on Integrity and Efficiency and the Executive Council on Integrity and Efficiency (Jan. 11, 2006) 16

Letter from Civil Rights Div., U.S. Dep't of Justice, to Michael O'Brien, Mayor, City of Warren, et al., Re: Warren Police Dep't (Mar. 2, 2006), *available at* http://www.usdoj.gov/crt/split/documents/wpd_talet_3-2-06.pdf ... 18

Letter from Civil Rights Div., U.S. Dep't of Justice, to Ruth Crater, Corp. Counsel, City of Detroit, Re: Investigation of the Detroit Police Dep't (Mar. 6, 2002), *available at* http://www.usdoj.gov/crt/split/documents/dpd/detroit_3_6.htm 17-18

PAGE

Letter from Civil Rights Div., U.S. Dep't of Justice, to Subodh Chandra, Dir., Cleveland City Law Dep't, Re: Investigation of the Cleveland Div. of Police (July 23, 2002), *available at* http://www.usdoj.gov/crt/split/documents/cleveland_uof.pdf) 18

Letter from Civil Rights Div., U.S. Dep't of Justice, to Michael Brockbank, Corp. Counsel, Schenectady, Re: Investigation of the Schenectady Police Dep't (Mar. 19, 2003), *available at* http://www.usdoj.gov/crt/split/documents/schenectady_ta.pdf 18

Letter from Civil Rights Div., U.S. Dep't of Justice, to Frank James, Baker, Donelson, Bearman, Caldwell, & Berkowitz, PC, Re: Investigation of the Alabaster Police Dep't (Nov. 9, 2004), *available* at http://www.usdoj.gov/crt/split/documents/split_alabaster_talet_11_09_04.pdf 18

Letter from Civil Rights Div., U.S. Dep't of Justice, to Attorney General Kerry Drue, Dep't of Justice, et al., Re: United States Dep't of Justice Investigation of the Virgin Islands Police Dep't (Oct. 5, 2005), *available at* http://www.usdoj.gov/crt/split/documents/virgin_island_pd_talet_10-5-05.pdf 18-19

Louisiana Office of the Inspector General, http://doa.louisiana.gov/ ig/inspector.htm 5

Massachusetts Office of the Inspector General, http://mass.gov/ig 5

PAGE

Matthew J. Hickman, U.S. Dep't of Justice, Office of Justice Programs, *Bureau of Justice Statistics Special Report: Citizen Complaints About Police Use of Force* (June 2006), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/ccpuf.pdf 8, 13

Memorandum from Christopher A. Wray to All Fed. Prosecutors Re: The Increasing Role of the Offices of Inspector Gen., and Uniform Advice of Rights Forms for Interviews of Gov't Employees (May 6, 2005) 20

Memorandum of Agreement Between the U.S. Dep't of Justice and the Dist. of Columbia and the Washington Metro. Police Dep't (June 13, 2001), *available at* http://www.usdoj.gov/crt/split/documents/dcmoa.htm 17

New York State Office of the Inspector General, http://www.ig.state.ny.us 5

Office of the Indep. Monitor for the Metro. Police Dep't, *Final Report* (June 13, 2008), *available at* http://www.policemonitor.org/080613reportv2.pdf 9, 24

Office of the Inspector General for the Texas Department of Criminal Justice, http://www.tdcj.state.txus/inspector.general/inspector.gnl-home.htm 5

The State and Local Law Enforcement Discipline, Accountability, and Due Process Act, S. 449, 110th Cong. (2007) 8

PAGE

Treasury Inspector Gen. for Tax Admin., *Investigatory Interview Procedures*, *available at* http://www.ustreas.gov/tigta/oi_interview.shtm 22

U.S. Fish and Wildlife Serv., *Professional Responsibility Unit and Allegations of Service LE Misconduct* (Feb. 2007), *available at* http://www.fws.gov/policy/441fw5.html 22

Wayne W. Schmidt, *Interviews and Interrogations of Public Employees: Beckwith, Garrity, Miranda, and Weingarten Rights*, LAW ENFORCEMENT EXECUTIVE FORUM (Nov. 2004) 5

INTEREST OF THE AMICI CURIAE

This brief in support of petitioners' request for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is submitted by the following law enforcement officer associations as amici curiae: The National Association of Police Organizations, Inc. ("NAPO"), the National Troopers Coalition ("NTC"), the Peace Officers' Research Association of California ("PORAC"), the Maryland Troopers Association, Inc. ("MTA"), and the Las Vegas Police Protective Association Metro, Inc. ("LVPPA").[1]

NAPO is a coalition of police unions and associations from across the United States that serves to advance the interests of America's law enforcement officers through legislative and legal advocacy, political action, and education. Founded in 1978, NAPO represents more than 2,000 police unions and associations, 238,000 sworn law enforcement officers, 11,000 retired officers, and more than 100,000 citizens who share a common dedication to fair and effective crime control and law enforcement. NAPO often appears as amicus curiae

---

[1] In accordance with Rule 37.6, the amici curiae certify that counsel for a party did not author this brief in whole or in part and that no entity other than amici or their counsel made a monetary contribution to the preparation or submission of the brief. The amici curiae also certify that all counsel of record received timely notice of amici's intent to file this brief, and the parties have consented to the filing of this brief, as reflected in letters filed with the Clerk of the Court.

in appellate cases of special importance to the law enforcement profession.

NTC represents the interests of the majority of State Trooper and Highway Patrol Associations in the United States. The membership in these associations consists of approximately 40,000 state police troopers throughout the country. The NTC works with its member associations to achieve better working conditions for these troopers and strives to promote legislation and court decisions that make the rights and responsibilities of troopers nationwide more fair, consistent, and understandable.

PORAC is a federation of local, state, and federal law enforcement associations devoted to representing and protecting the rights and benefits of law enforcement officers. With more than 775 member organizations, PORAC represents more than 60,000 officers in California and Nevada. PORAC's Legal Defense Fund provides legal representation to peace officers across the country in criminal, civil, and administrative matters arising within the scope of their employment and in cases whose resolution may impact the rights or responsibilities of PORAC members.

MTA represents approximately 2,000 sworn members of the Maryland State Police. The MTA provides various benefits for its members, including legal representation for sworn members whenever they are under investigation for alleged violations of administrative rules or regulations and advocacy for legislation to improve the rights of its members.

LVPPA represents the interests of approximately 2,700 police and corrections officers in southern Nevada, including many police and corrections

officers employed by the Las Vegas Metropolitan Police Department and the Deputy City Marshals and Municipal Court Marshals employed by the City of Las Vegas. Among other services, LVPPA provides its members legal representation in disciplinary and other matters and lobbies state and local government officials to adopt policies benefiting its members.

Together, these national, state, and local organizations represent approximately 350,000 law enforcement officers throughout the United States. This Court's constitutional rulings in *Garrity v. State of New Jersey*, 385 U.S. 493 (1967), and related cases are of abiding interest to all these organizations.

INTRODUCTION

Every year, tens of thousands of police officers are subject to internal investigations of potential misconduct – criminal misconduct, which can result in prosecution, and administrative misconduct, which can result in employment sanctions including termination. Because of the potentially serious consequences for the subjects of these investigations, it is of paramount importance to law enforcement officers across the United States – federal, state, and local – that this Court resolve the confusion that currently exists over whether public employees are entitled to notice of their immunity rights under *Garrity*.

This case presents the Court with an opportunity to clarify one of the most opaque, and yet significant, areas of Fifth Amendment law and to resolve the current split among the courts of appeals over whether public employees, including police officers, subject to misconduct investigations must be

informed that any compelled incriminating statements they give cannot be used against them in subsequent criminal proceedings. Law enforcement agencies and individual officers across the nation have a strong interest in ensuring that the law on this point is clear so that all participants in the process have an accurate and fair understanding of the legal landscape in which they operate on a daily basis. Individual officers, sworn to enforce the laws and to secure public safety, deserve a clear, "bright line" definition of their rights and obligations under the Fifth Amendment and *Garrity*.

REASONS FOR GRANTING THE PETITION

I. THE WIDESPREAD UNCERTAINTY ABOUT THE FIFTH AMENDMENT'S "*GARRITY* NOTICE" REQUIREMENT IMPAIRS THE EFFECTIVENESS AND FAIRNESS OF INVESTIGATIONS PERFORMED BY PUBLIC AGENCIES

A. Internal Investigations Of Alleged Misconduct By Public Employees Are Central To The Public's Confidence In Government Institutions, Including Especially Law Enforcement Agencies

In recent decades, federal, state, and local governments – and law enforcement agencies in particular – have stressed greater accountability of public institutions and their employees. Internal

investigations of alleged misconduct by public employees are central to these reforms.[2]

At the federal level, the Inspector General Act of 1978 created offices in various federal departments and agencies that are responsible for preventing and detecting fraud, waste, and abuse, in part through pursuing allegations of employee misconduct. Inspector General Act of 1978 (as amended), 5 U.S.C. app. 3 §§ 2, 4, 7. Many state and local government agencies have followed the federal model and established internal investigative entities designed to identify and address, among other things, misconduct by public officials and employees.[3] In

---

[2] *See, e.g.*, Wayne W. Schmidt, *Interviews and Interrogations of Public Employees: Beckwith, Garrity, Miranda, and Weingarten Rights*, LAW ENFORCEMENT EXECUTIVE FORUM (Nov. 2004) ("Because public entities function with the consent of the governed, there is a duty to internally investigate allegations of official and employee misconduct.").

[3] *See, e.g.*, Georgia Office of the Inspector General, http://oig.Georgia.gov (last visited Aug. 26, 2008); Louisiana Office of the Inspector General, http://doa.louisiana.gov/oig/inspector.htm (last visited Aug. 26, 2008); Massachusetts Office of the Inspector General, http://www.mass.gov/ig (last visited Aug. 26, 2008); New York State Office of the Inspector General, http://www.ig.state.ny.us (last visited Aug. 26, 2008) (This office is "entrusted with the responsibility of ensuring that State government, its employees and those who work with the state meet the highest standards of honesty, accountability, and efficiency."); California Office of the Inspector General, http://www.oig.ca.gov (last visited Aug. 26, 2008); Office of the Inspector General for the Texas Department of Criminal Justice, http://www.tdcj.state.txus/inspector.general/inspector.gnl-home.htm (last visited Aug. 26, 2008); and

state and local law enforcement agencies, allegations of misconduct by police officers, including allegations of excessive force and corruption, typically are investigated by the internal affairs and professional responsibility functions that exist, in some form, in virtually every law enforcement agency.

Thorough and prompt internal investigations of allegations of misconduct are central to building and reinforcing the public's confidence in the integrity and professionalism of law enforcement agencies.[4] As articulated by a distinguished former Attorney General, "[e]very police department should make sure that it has in place a vigorous system for investigating allegations of misconduct thoroughly and fairly [and that a] fair system ensures due process both for the officer and for those filing complaints." Janet Reno, U.S. Attorney Gen., Address at National Press Club Luncheon (Apr. 15,

---

[Footnote continued from previous page]

City of Chicago Office of the Inspector General, http://chicagoinspectorgeneral.org/office-history.html (last visited Aug. 26, 2008).

[4] For example, the Delaware State Police recently established an Office of Professional Responsibility, which performs internal affairs investigations, recognizing that "the public image of the Delaware State Police is, to a large degree, determined by the way the Internal Affairs Office responds to allegations of misconduct of its employees." Delaware State Police Office of Professional Responsibility, http://dsp.delaware.gov/oopr.shtml (last visited Aug. 26, 2008).

1999).[5] Because mere allegations of excessive force or corruption by police officers often receive extensive media coverage, maintenance of the public's trust and confidence in law enforcement agencies demands that police departments conduct comprehensive, fair, and timely internal investigations.[6]

B. Law Enforcement Agencies' Internal Investigations Of Misconduct Allegations Against Law Enforcement Officers Must Respect Their Fifth Amendment Rights

1. Police Officers Are Frequently Subject To Internal Investigations Of Alleged Misconduct

Law enforcement agencies have in recent years made significant strides in improving the integrity of their departments and officers. However, the development of tougher and more rigorous methods for pursuing internal investigations in law enforcement agencies has generated widespread criticism concerning whether these governmental

---

[5] A transcript of Attorney General Reno's speech is available at http://www.usdoj.gov/archive/ag/speeches/1999/npc.htm.

[6] *See, e.g.,* Beau Thurnauer, *Best Practices Guide for Internal Affairs: A Strategy for Smaller Departments* 1-3 (International Association of Chiefs of Police, undated), *available at* http:www.theiacp.org/documents/pdfs/Publications/BP-InternalAffairs.pdf ("Effective IA units will insure that complaints are heard . . . [and] dealt with quickly and effectively. * * * [D]epartment staff will have a higher level of public support if every investigation is done fairly and uniformly.").

compliance regimes are fair to individual officers. For example, the Law Enforcement Officers Procedural Bill of Rights Act, currently pending before the House of Representatives, was introduced in response to "a significant lack of due process rights of law enforcement officers during internal investigations [which] has resulted in a loss of confidence in these processes." Law Enforcement Officers Procedural Bill of Rights, H.R. 3440, 110th Cong. (2007).[7]

Notifying police officers of their *Garrity* rights is central to the fair – and constitutionally appropriate – treatment of officers who are subject to internal investigations by their departments. Every year, tens of thousands of law enforcement officers are subject to internal investigations based on citizen complaints, use of force incidents, or other circumstances requiring investigation of potential administrative misconduct or criminal activity.[8] To

---

[7] *See also* The State and Local Law Enforcement Discipline, Accountability, and Due Process Act, S. 449, 110th Cong. (2007).

[8] In 2002, more than 25,000 citizen complaints concerning officer use of force were lodged with large law enforcement agencies (those employing more than 100 officers) in the United States. Matthew J. Hickman, U.S. Dep't of Justice, Office of Justice Programs, *Bureau of Justice Statistics Special Report: Citizen Complaints About Police Use of Force* (June 2006), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/ccpuf.pdf. Many such investigations relate to uses of serious or deadly force by police officers, which carry with them greater potential for criminal liability for the involved officers. For example, during the first nine months of 2007, the District of Columbia's Metropolitan Police Department, which employs more than 3,300 sworn

succeed in achieving a fair and appropriate result, these investigations require testimony or written statements by one or more officers who have been accused of misconduct.[9]

2. Notice Of *Garrity* Rights Is The Only Constitutionally Permissible Rule

Police officers should not be afforded special rights or privileges under the Constitution, but they certainly should not be denied the same protections enjoyed by other citizens. This Court has made clear that "policemen, like teachers and lawyers, are not relegated to a watered-down version of constitutional rights." *Garrity*, 385 U.S. at 500.[10]

Indeed, the Court in *Garrity* directly compared the "coercion inherent" in forcing on public employees the "option to lose their means of

---

[Footnote continued from previous page]

members, completed a total of 56 internal investigations of serious and deadly use of force incidents. Office of the Indep. Monitor for the Metro. Police Dep't, *Final Report* 40 (June 13, 2008), *available at* http://www.policemonitor.org/080613reportv2.pdf.

[9] The Fifth Amendment's requirements concerning the notice to which public employees accused of wrongdoing are entitled regarding their immunity rights under *Garrity*, of course, have broader application than solely to law enforcement officers.

[10] In fact, *Garrity* marked the Court's departure from an earlier doctrine that afforded police officers less protection under the Constitution than other citizens. Byron L. Warnken, *The Law Enforcement Officers' Privilege Against Compelled Self-Incrimination*, 16 U. BALT. L. REV. 452, 457 (1987).

livelihood or to pay the penalty of self-incrimination" to the interrogation practices that gave rise to the Court's decision in *Miranda v. Arizona*, which introduced the constitutional rule that suspects must be advised of their right against self-incrimination before statements made during custodial questioning may be admitted into evidence. *Id.* at 497-98. Accordingly, the Court should fulfill *Garrity*'s promise – as recognized by the Second, Seventh, and Federal Circuits – that public employees, including police officers, also must be "duly advised of [their] options and the consequences of [their] choice" under the Fifth Amendment. *Uniformed Sanitation Men Ass'n v. Comm'r of Sanitation*, 426 F.2d 619, 627 (2d Cir. 1970). As Chief Judge Kozinski argued in his dissent from the Ninth Circuit's decision in this case, "the only constitutionally permissible rule" is that, unless the government informs public employees that any statements they make cannot be used against them in a criminal proceeding, it may not punish them for refusing to speak. *Aguilera v. Baca*, 510 F.3d 1161, 1177 (9th Cir. 2007) (Kozinski, C.J., dissenting).[11]

3. Clear Notice Of *Garrity* Rights Promotes The Interests Of Law Enforcement Agencies, Individual Officers, And The General Public

Not only is routine notice of *Garrity* rights "the only constitutionally permissible rule," but a "bright line" rule requiring law enforcement agencies to

---

[11] The Ninth Circuit's decision in this case is appended to the Petition for a Writ of Certiorari at 1a.

provide officers involved in misconduct investigations with information about their Fifth Amendment rights promotes the shared interests of police departments, individual officers, and the general public.

First, law enforcement agencies would benefit in several respects from a clear constitutional rule requiring that officers subject to internal investigations receive notice of their rights under *Garrity*. Responsible law enforcement executives favor *Garrity* notices because these warnings protect both the integrity of internal investigations and the individual rights of members of their agencies. Moreover, providing officers with accurate information about their Fifth Amendment rights facilitates fact gathering by internal investigators. As demonstrated by the excessive force investigation concerning the conduct of petitioners in this case, confusion about *Garrity's* application can lead to substantial delays in the completion of internal investigations, interfere with officers' willingness and ability to provide information to investigators, and divert resources from core public safety functions such as patrol duties.[12]

---

[12] According to the facts recited in the Ninth Circuit's decision in this case, the internal investigation into petitioners' conduct was delayed nearly one year while internal investigators sought "voluntary" statements from the petitioners, who refused to provide them. After the case was referred to the District Attorney's Office for consideration of criminal charges and prosecutors requested compelled statements from three of the petitioners, those petitioners provided statements and promptly were cleared of wrongdoing. For that entire year, petitioners were

Second, individual officers are entitled to be treated fairly and to be afforded a clear explanation of the *Garrity* rules, which directly affect not only their individual constitutional rights as citizens, but also their daily professional lives as law enforcement personnel. Police officers deserve better than to be forced to make, without a clear "bright line" defining their rights, the Hobson's choice between self-incrimination and their livelihood that *Garrity* was designed to eliminate. *Garrity*, 385 U.S. at 497-98.

Simply put, under this Court's decisions in *Garrity* and *Gardner v. Broderick*, 392 U.S. 273 (1968), police officers and other public employees should not be required to speculate as to the content of their constitutional rights. *Lybarger v. City of Los Angeles,* 40 Cal.3d 822, 834, 710 P.2d 329, 336 (1985) (Bird, C.J., concurring). Nor should officers who are pressured to give statements in connection with internal investigations be expected to know, without being told, that they have "automatic" immunity under *Garrity* and when that immunity attaches. *Aguilera*, 510 F.3d at 1179 (Kozinski, C.J., dissenting). In the absence of clear notice of their rights, law enforcement officers facing investigation may take refuge in the much more familiar and straightforward "right to remain silent" under *Miranda*, to the grave detriment of their careers and livelihood. *Id.* Officers face this quandary routinely

---

[Footnote continued from previous page]

removed from street patrol and assigned to station duties. *Aguilera*, 510 F.3d at 1166-67.

in internal investigations of misconduct allegations, the vast majority of which are never substantiated.[13]

Finally, the general public has an overriding interest in officers being provided a clear understanding of their rights under *Garrity*. When the involved parties – prosecutors, internal investigators, and subject officers – lack clarity about an accused officer's *Garrity* rights, there is significant risk that criminal investigations, involving potential civil rights violations and other crimes, will be jeopardized. A process without *Garrity* notice involves an inherent ambiguity about when officer statements are "compelled," such that *Garrity* immunity attaches automatically. Some investigators will fall into a trap created by that ambiguity and, without intending to do so, may inadvertently immunize officer statements and thereby eliminate a source of admissible evidence. The public is harmed when prosecutions of potential criminal violations by police officers are impaired due to poor or clumsy internal investigative procedures.

---

[13] In 2002, large state and local law enforcement agencies investigated more than 25,000 citizen complaints about officer use of force, only 8% of which were sustained as being supported by sufficient evidence to justify disciplinary action against the subject officers. Hickman, *supra* note 8, at 3.

C. The Conflict Among The Courts Of Appeals Regarding *Garrity* Notice Under The Fifth Amendment Has Generated Widespread Confusion And Uncertainty

1. The Ambiguity Resulting From The Circuit Split Has Created At Least Three Conflicting Legal Scenarios Under *Garrity*

Under *Garrity*, public employees' compelled statements cannot be used against them in criminal proceedings. The Court, however, has not yet addressed whether the Fifth Amendment and *Garrity* require the government to notify public employees of their immunity rights. Without the benefit of this Court's guidance, the courts of appeals have created at least three different answers to the question of *Garrity* notice.

The Second, Seventh, and Federal Circuits have ruled that a public employer can compel testimony (or punish silence) only if the employer explicitly notifies the employee that (a) the testimony is being compelled; (b) under *Garrity*, the compelled testimony cannot be used in a subsequent criminal proceeding; and (c) the employer may administratively punish the employee if he or she fails to testify.[14]

The First Circuit has held that a public employer can compel testimony (or punish silence) only when

---

[14] *Uniformed Sanitation Men Ass'n*, 426 F.2d at 627; *Confederation of Police v. Conlisk*, 489 F.2d 891, 894 (7th Cir. 1973); *Modrowski v. Dep't of Veterans Affairs*, 252 F.3d 1344, 1351 (Fed. Cir. 2001).

the "totality of the circumstances" demonstrates that the relevant employee objectively should have known about his immunity, even if he was not expressly granted this immunity or given explicit notice of it.[15]

The Fifth, Eighth, and, now, the Ninth Circuits allow a public employer to compel testimony (or punish silence) *in any circumstance* because they hold that *Garrity* immunity attaches automatically upon an employee's being coerced to answer questions, as long as the employer does not demand that the employee waive his *Garrity* immunity.[16]

2. The Confusion Over Application Of The *Garrity* Notice Requirement Is Reflected In The Ambiguous Guidance Provided To Investigators And Officers

The confusion created by the absence of a "bright line" rule requiring *Garrity* notice is reflected in the vague and ambiguous guidance provided to police investigators and officers concerning the conduct of internal investigations. Commanders and supervisors frequently are unsure about the proper procedures to employ in the context of particular

---

[15] *Sher v. U.S. Dep't of Veterans Affairs*, 488 F.3d 489 (1st Cir. 2007) (finding that, although the court did not have to decide whether the public employer had to give the relevant employee notice of the application and consequences of his *Garrity* immunity, there was no constitutional violation because the employee could be "fairly charged with [having received] such notice under the circumstances").

[16] *Gulden v. McCorkle*, 680 F.2d 1070, 1074 (5th Cir. 1982); *Hill v. Johnson*, 160 F.3d 469, 471 (8th Cir. 1998); *Aguilera*, 510 F.3d 1161.

investigations. For example, a Best Practices Guide issued by the International Association of Chiefs of Police opaquely advises police executives to "[g]ive *Garrity* warnings if you feel it is appropriate . . . . You will probably not use *Garrity* [warnings] in every circumstance." Beau Thurnauer, *Best Practices Guide for Internal Affairs: A Strategy for Smaller Departments* 3-4 (International Association of Chiefs of Police, undated). As a result, investigators "sometimes give no warning or give the wrong warning." J. Michael Hannon, *Security Clearances: Know Your Rights*, FOREIGN SERV. J. 58 (Sept. 2005). This lack of clarity about the protections afforded under *Garrity* and the Fifth Amendment invites unfair gamesmanship and manipulation by investigators in defining the circumstances under which requests for statements are "voluntary" as opposed to "compelled," which in turn foster distrust of internal investigators and police supervisors.

II. Use Of *Garrity* Notices Is Widely Regarded As A Best Practice In Law Enforcement And Is A Practical And Effective Method For Protecting Officers' Fifth Amendment Rights

A. *Garrity* Notice Is A Best Practice In Law Enforcement

The Department of Justice has praised the use of *Garrity* warnings as "the best and preferred practice." *See* Letter from Alice S. Fisher, Assistant Attorney Gen., to Vice Chairs of the President's Council on Integrity and Efficiency and the Executive Council on Integrity and Efficiency (Jan. 11, 2006). These warnings merit being described as

a best practice because, for the reasons discussed above, they are integral to the fair and effective internal investigations of use of force incidents and allegations of officer misconduct.

Since the 1990s, the Civil Rights Division of the Justice Department has actively promoted the adoption, by state and local law enforcement agencies, of policies requiring that officers receive notice of their rights under *Garrity*. Through consent decrees, memoranda of agreement, findings letters, and technical assistance memoranda, the Civil Rights Division, as part of its legislative mandate under 42 U.S.C. § 14141 to investigate local law enforcement agencies for potential civil rights violations, has either required or recommended that at least eight local police agencies revise their policies to establish protocols for the taking of compelled statements from officers consistent with *Garrity*.[17] With respect to three of these

---

[17] These agencies include the District of Columbia's Metropolitan Police Department, the Detroit Police Department, the Warren (Ohio) Police Department, the Cleveland Police Department, the Schenectady Police Department, the Steubenville (Ohio) Police Department, the Virgin Islands Police Department, and the Alabaster (Alabama) Police Department. *See* Memorandum of Agreement Between the U.S. Dep't of Justice and the Dist. of Columbia and the Dist. of Columbia Metro. Police Dep't ¶¶ 58-72 (June 13, 2001), *available at* http://www.usdoj.gov/crt/split/documents/dcmoa.htm; Consent Judgment, *United States v. City of Detroit*, No. 03-72258, ¶ 31 (E.D. Mich. June 12, 2003), *available at* http://www.usdoj.gov/crt/split/documents/dpd/detroitpd_uofwdcd_613.pdf; Letter from Civil Rights Div., U.S. Dep't of Justice, to Ruth Crater, Corp. Counsel, City of Detroit, Re: Investigation of the

jurisdictions — Steubenville (Ohio), the Virgin Islands, and Alabaster (Alabama) – the Civil Rights Division specifically recommended that the relevant agencies develop policies or guidelines ensuring that "officers are adequately informed of their rights against self-incrimination." Letter from Civil Rights

---

[Footnote continued from previous page]

Detroit Police Dep't 4 (Mar. 6, 2002), *available at* http://www.usdoj.gov/crt/split/documents/dpd/detroit_3_6.htm; Letter from Civil Rights Div., U.S. Dep't of Justice, to Michael O'Brien, Mayor, City of Warren, et al., Re: Warren Police Dep't 20 (Mar. 2, 2006), *available at* http://www.usdoj.gov/crt/split/documents/wpd_talet_3-2-06.pdf; Letter from Civil Rights Div., U.S. Dep't of Justice, to Subodh Chandra, Dir., Cleveland City Law Dep't, Re: Investigation of the Cleveland Div. of Police 10 (July 23, 2002), *available at* http://www.usdoj.gov/crt/split/documents/cleveland_uof.pdf); Letter from Civil Rights Div., U.S. Dep't of Justice, to Michael Brockbank, Corp. Counsel, Schenectady, Re: Investigation of the Schenectady Police Dep't 14-15 (Mar. 19, 2003), *available at* http://www.usdoj.gov/crt/split/documents/schenectady_ta.pdf; Consent Decree, *United States v. City of Steubenville*, Civ. No. C2 97-966 (S.D. Ohio Sept. 3, 1997), *available at* http://www.usdoj.gov/crt/split/documents/steubensa.htm; Letter from Civil Rights Div., U.S. Dep't of Justice, to Attorney Gen. Kerry Drue, Dep't of Justice, et al., Re: United States Dep't of Justice Investigation of the Virgin Islands Police Dep't 20 (Oct. 5, 2005), *available at* http://www.usdoj.gov/crt/split/documents/virgin_island_pd_talet_10-5-05.pdf; Letter from Civil Rights Div., U.S. Dep't of Justice, to Frank James, Baker, Donelson, Bearman, Caldwell, & Berkowitz, PC, Re: Investigation of the Alabaster Police Dep't 15 (Nov. 9, 2004), *available* at http://www.usdoj.gov/crt/split/documents/split_alabaster_talet_11_09_04.pdf.

Div., U.S. Dep't of Justice, to Frank James, Baker, Donelson, Bearman, Caldwell, & Berkowitz, PC, Re: Investigation of the Alabaster Police Dep't 15 (Nov. 9, 2004).[18]

B. Law Enforcement Agencies Across The Nation Use *Garrity* Notices As A Practical And Effective Method For Protecting The Integrity Of Internal Investigations And Officers' Rights

Law enforcement agencies at the federal, state, and local levels have implemented a range of policies designed to provide police officers who are subject to internal investigations with notice of the law under *Garrity*. The notice consists of: (1) advising the officer that he or she may refuse to provide a voluntary statement to investigators, but if the employee chooses to make a voluntary statement it may be used against him or her in a subsequent criminal prosecution; and (2) if the officer is required to provide information to investigators and the officer refuses to do so, the agency may impose discipline, including dismissal, although any statement provided by the officer in response to this

---

[18] *See also* Consent Decree, *United States v. City of Steubenville*, Civil No. C2 97-966, ¶ 46 (S.D. Ohio Sept. 3, 1997), *available at* http://www.usdoj.gov/crt/split/documents/steubensa.htm ("Officers who are the subject of an [Internal Affairs] investigation shall be informed of their rights and obligations under *Garrity*."); Letter from Civil Rights Div., U.S. Dep't of Justice, to Attorney Gen. Kerry Drue, Dep't of Justice, et al., Re: United States Dep't of Justice Investigation of the Virgin Islands Police Dep't 20 (Oct. 5, 2005), *available at* http://www.usdoj.gov/crt/split/documents/virgin_island_pd_talet_10-5-05.pdf.

direction cannot be used against him or her in a subsequent criminal proceeding. The specific procedures that individual agencies employ to advise officers of their rights under *Garrity* vary, but providing this basic information is fundamental to any fair and effective internal investigations policy.

1. Federal Agencies

In 2004, a working group in the Department of Justice[19] drafted model *Garrity* warnings that were subsequently approved by the Attorney General and distributed to all federal prosecutors. In its memorandum accompanying the model warning forms, the Department of Justice emphasized to federal prosecutors that, when employees are compelled, including by the risk of losing their jobs, to answer questions, they "must be assured" that their statements may not be used against them in subsequent criminal proceedings. Memorandum from Christopher A. Wray to All Fed. Prosecutors Re: The Increasing Role of the Offices of Inspector Gen., and Uniform Advice of Rights Forms for Interviews of Gov't Employees 2 (May 6, 2005). The

---

[19] This working group was formed by the President's Council on Integrity and Efficiency and included representatives from the Department of Justice's Public Integrity Section and the Inspector General community. The working group found that federal agencies had been using a "patchwork of different forms, many of which contain[ed] language that is outdated and unnecessary" to advise public employees of their rights under *Garrity*. Memorandum from Christopher A. Wray to All Fed. Prosecutors Re: The Increasing Role of the Offices of Inspector Gen., and Uniform Advice of Rights Forms for Interviews of Gov't Employees 3 (May 6, 2005).

Justice Department also encouraged the individual Offices of Inspector General to use these model *Garrity* warnings during their investigations. *Id.*

The Department of Justice's Office of the Inspector General and the Federal Bureau of Investigation ("FBI") follow similar practices in their internal investigations. They require employees who do not consent to being interviewed to be provided with a form indicating that neither the interviewee's statements nor information derived from such statements may be used in any subsequent criminal prosecution of the employee, but that the employee has a duty to reply to the questions and that disciplinary action, including dismissal, may be taken if he or she refuses to answer the questions posed. For example, the FBI Manual of Administrative Operations and Procedures requires investigators to issue warnings by using one of two forms, depending on whether investigators are seeking a voluntary or a compelled statement. If a voluntary statement is sought, the FBI uses Form FD-644, which advises the employee that his or her statement is voluntary and that refusal to answer questions cannot result in adverse employment action, although the government is free to use any statements by the employee against him or her in any subsequent criminal prosecution or agency disciplinary proceeding. If an employee's statement is compelled, then FBI investigators use Form FD-645 to advise the employee that the agency can impose sanctions, including dismissal, if he or she refuses to make a statement, but that his or her statement cannot be used in any subsequent criminal prosecution. *See United States v. Friedrick*, 842 F.2d 382, 385 (D.C. Cir. 1988) (citing the FBI

Manual of Administrative Operations and Procedures at sections 13-6.1, 13-6.2).

Other federal agencies, including the State Department and Federal Communications Commission, have adopted similar procedures requiring supervisors and investigators to issue *Garrity* warnings in the context of internal investigations.[20]

2. State And Local Agencies

Many local law enforcement agencies have adopted policies requiring *Garrity* warnings similar to those recommended by the Department of Justice. For example, the District of Columbia Metropolitan Police Department's ("MPD") internal investigations policy requires that investigators advise subject officers either that (1) the officer's statement is not compelled and, therefore, the decision not to provide a statement "will in no way affect employment with the Metropolitan Police Department" or (2) the officer is being questioned about administrative matters and is required to answer questions fully and truthfully, but any self-incriminating information the officer discloses will not be used

---

[20] *See* Federal Commc'ns Comm., *Employee Rights and Warnings*, *available at* http://www.fcc.gov/oig/oigrights.html; Treasury Inspector Gen. for Tax Admin., *Investigatory Interview Procedures*, *available at* http://www.ustreas.gov/tigta/oi_interview.shtml; J. Michael Hannon, *Security Clearances: Know Your Rights*, FOREIGN SERV. J. 58 (Sept. 2005); U.S. Fish and Wildlife Serv., *Professional Responsibility Unit and Allegations of Service LE Misconduct* (Feb. 2007), *available at* http://www.fws.gov/policy/441fw5.html.

against him or her in a court of law. D.C. Metro. Police Dep't, Officer Legal Protection Advisory Statement; D.C. Metro. Police Dep't, Reverse Garrity Warning. *Garrity* warnings similar to the MPD's notice concerning compelled statements are used by other police agencies across the United States, including the Miami-Dade Police Department, the Phoenix Police Department, the Los Angeles Police Department, and the New Orleans Police Department.[21]

C. *Garrity* Notice Procedures Are Easy To Implement And Are Effective

As demonstrated by the experience of law enforcement agencies that use *Garrity* warnings, requiring that internal investigators routinely notify officers when their statements are being compelled, and tell them what their rights are under those circumstances, is simple, practical, and straightforward. Agencies such as the FBI and MPD use standardized alternative forms depending on whether investigators are seeking voluntary or compelled statements.

As reflected in the reports of the Independent Monitor for MPD, *Garrity*-related procedures can be extremely effective if properly implemented. A

---

[21] Miami Dade Police Dep't, "Subject Employee Statement Form"; City of Phoenix Police Dep't, "Notice of Investigation Form"; L.A. Police Dep't, "Administrative Admonition of Rights and Employee Advisement Form"; and New Orleans Police Dep't, "Notice of NOPD Internal Disciplinary Investigation Rights and Responsibilities of Employee Under Investigation & Notification to Appear to Render a Statement."

review by MPD's Independent Monitor of 780 MPD internal investigations of use of force incidents and misconduct allegations closed between October 2005 and September 2007 identified *no* cases in which MPD obtained an inappropriate compelled statement from a subject officer. Office of the Indep. Monitor for the Metro. Police Dep't, *Final Report* 53 (June 13, 2008). These findings were supported by the United States Attorney's Office for the District of Columbia, which advised the Independent Monitor that cases in which MPD internal investigators had taken an inappropriate compelled statement from a subject officer were "extremely rare." *Id.*

III. This Is An Ideal Case For Review Because It Implicates Many Of The Significant Issues Presented By The Absence Of A "Bright Line" *Garrity* Rule

This case provides the Court with an ideal opportunity to resolve the confusing split among the courts of appeals over whether the Fifth Amendment and *Garrity* require a "bright line" notice rule.

First, this case involves law enforcement personnel who are the public employees most at risk in the absence of a "bright line" *Garrity* notice rule. Because law enforcement by its nature sometimes requires force and confrontation with citizens, which give rise to allegations of use of excessive force and misconduct, and because of the positive reforms that have led to increased accountability for individual officers in performing their duties, tens of thousands of law enforcement officers are subject to internal investigations every year. Accordingly, the protections afforded under the Fifth Amendment and *Garrity* are of paramount importance to these law

enforcement officers, as well as to millions of other public employees.

Second, the dangers created by the current ambiguity in *Garrity*'s application are particularly well illustrated by the facts of this case. These petitioners endured various detrimental employment-related consequences as a result of the ambiguity over when *Garrity* protections attach during the internal investigative process. Straightforward *Garrity* warnings would have provided the officers with certainty about their rights and obligations in responding to inquiries from internal investigators and would have aided in a much more prompt disposition of the underlying investigation. Instead, the investigation languished for nearly a year while the petitioners were harmed by the lack of a clearly defined boundary between "voluntariness" and "compulsion" caused by the absence of a "bright line" *Garrity* notice rule.

Third, most internal investigations, including the one involved in this case, involve allegations of excessive force or other misconduct that prove to be without merit. Even under the extremely common circumstances when the evidence does not support a finding that officers used excessive force or engaged in other forms of misconduct, officers may suffer negative employment-related consequences when they do not have an accurate and fair understanding of their status, rights, and obligations under *Garrity*.

Finally, the Ninth Circuit's opinion below acknowledged the division among the courts of appeals concerning *Garrity* notice and explicitly rejected the approach adopted by several other federal courts of appeals, including, in particular,

the Second, Seventh, and Federal Circuits. The split in the Circuits could not be sharper. This case offers this Court the overdue opportunity to squarely address the requirements of *Garrity*.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

MICHAEL R. BROMWICH
Counsel of Record
TOMMY P. BEAUDREAU
KAREN S. BLOOM
FRIED, FRANK, HARRIS,
SHRIVER & JACOBSON LLP
1001 Pennsylvania Ave, NW
Washington, D.C. 20004-2505
(202) 639-7000

Counsel for Amici Curiae

AUGUST 27, 2008